BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARTAN JERMAINE HENDERSON	)	
Claimant	)	
V.	)	
	)	
A & A TRUCK RENTAL	)	Docket No. 1,065,806
3 MEN WITH A TRUCK & TRAILER, LLC	)	
Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of Administrative Law Judge Rebecca Sanders' February 11, 2014 preliminary hearing Order. Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Cynthia J. Sheppeard of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent). Darin M. Conklin of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The appeal record is the same as that considered by the judge and consists of the August 20, 2013 preliminary hearing transcript and exhibits thereto, the September 26, 2013 deposition transcript of David Cox, the December 18, 2013 preliminary hearing transcript and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant initially alleged a May 15, 2013 injury from lifting and moving furniture. He currently alleges injury by repetitive trauma from December 12, 2012 through June 11, 2013, to his back, neck, abdomen and bilateral shoulders from lifting, moving furniture and being pinned by a gun safe.

On August 23, 2013, the Court issued the first preliminary hearing Order finding claimant was an employee of respondent, but he did not provide notice under K.S.A. 44-520(a). A second preliminary hearing was held on December 18, 2013. In the corresponding February 11, 2014 Order, the judge again concluded claimant did not give proper notice.

Claimant requests the preliminary hearing Order be reversed, arguing he proved notice, while respondent and the Fund maintain the Order should be affirmed.

The only issue for Board review is: Did claimant provide proper notice?

FINDINGS OF FACT

Claimant worked for respondent from May 2007 until June 11, 2013. His job duties included packing, loading trucks and moving furniture.

Claimant testified his job caused him frequent back discomfort, but alleged it was not until a 500 pound gun safe fell down some stairs on him that he began having ongoing pain that would not go away with "a couple of days of light duty work."[1] Light duty work consisted of cleaning and sweeping the shop, cleaning and painting trucks, taking out trash and lifting light items on moving jobs. Claimant testified he would perform light duty work whenever he was having issues with his back.

Claimant last worked for respondent on June 11, 2013. On June 13, 2013, claimant filed an application for hearing in which he alleged lifting and moving furniture injured his back, neck and bilateral shoulders on May 15, 2013.

On June 25, 2013, claimant was seen at his attorney's request by Pedro Murati, M.D., for complaints of bilateral hip pain which occasionally radiated down both legs, numbness and tingling in the left arm and both feet, and pain in his left shoulder, neck, upper back and mid-back. The history provided was:

> According to the claimant, on 05-15-13 he was moving a 550 pounds [sic] gun safe with the help of a coworker. He states that he was at the bottom and the guy holding the top of the safe dropped it causing the claimant to become pinned to the wall. The claimant states that he went to the emergency room with pain in his upper back, neck, and both shoulders.[2]

Dr. Murati diagnosed claimant with a left rotator cuff tear versus sprain, myofascial pain syndrome affecting the left shoulder girdle extending into the cervical and thoracic paraspinals, and bilateral hip pain secondary to lumbosacral radiculopathy. Regarding causation, Dr. Murati stated, "This claimant's current diagnoses . . . are within all reasonable medical probability a direct result from the work-related injury that occurred on 05-15-13 during his employment with Jayhawk Moving."[3] In addressing prevailing factor, Dr. Murati stated, "the prevailing factor in the development of his conditions is the accident and multiple repetitive traumas at work."[4] Dr. Murati recommended injections, MRIs, an EMG, physical therapy and medications. If conservative treatment did not provide relief, Dr. Murati would recommend a surgical consultation.

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[1] P.H. Trans. (Aug. 20, 2013) at 25.

[2] *Id.*, Cl. Ex. 1 at 1.

[3] *Id.*, Cl. Ex. 1 at 3.

[4] *Id.*, Cl. Ex. 1 at 4.

Claimant went to work for Walmart on June 24, 2013, but testified he was terminated in early-July after being unable to perform his duties. Claimant is currently receiving unemployment compensation.

Claimant testified at the August 20, 2013 preliminary hearing that he went to the emergency room the day the safe fell on him. He further testified that he and a coworker, David Cox, told Curt Cochran, who was in charge of arranging moving jobs for respondent, about the incident "[r]ight then . . . ."[5] Mr. Cochran denied claimant telling him about a traumatic event. Claimant continued accepting moving jobs after May 15, 2013, but could not say with certainty whether the moving jobs were light duty jobs. Mr. Cochran further indicated he did not know there was something seriously wrong with claimant's back until late-May or early-June 2013, based on the fact claimant was rejecting moving jobs.

Claimant testified he did not know the actual date of the gun safe incident, but it was prior to May 15, 2013, and Dr. Murati was wrong that the incident occurred on May 15, 2013. He testified the gun safe incident "was at least three to four weeks prior to May 15th, which was day where - - I had already started to feel stuff, but May 15th was the day when I carried this really, really, heavy TV and like I said, I almost dropped it; and that's the day where I had to tell Curt my body's not right. May - - the day when the safe fell on me, that's when things started to really kind of get worse than what they ever actually had been."[6]

In the judge's initial preliminary hearing Order dated August 23, 2013, she noted:

> It is not clear from the evidence that Claimant provided any specifics as to date, time and specifics of the injury. There is little or [no] evidence that Claimant told Respondent about the gun safe incident injuring his low back and that his back injury got worse as he continued to work.
>
> It is found and concluded that Claimant did not provide proper notice under K.S.A. (2011 Supp.) 44-520(a). Therefore, Claimant's workers' compensation claim is not compensable.[7]

Mr. Cox initially testified on September 26, 2013. He testified he let go of the safe and witnessed claimant being pinned against a wall. Mr. Cox testified claimant complained of stomach pain. Mr. Cox could not remember when the incident occurred, but was certain it was on a Wednesday. He testified that he and claimant told Mr. Cochran about the accident the very day it occurred and made it clear to Mr. Cochran that claimant had been injured.

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[5] *Id.* at 31.

[6] *Id.* at 49.

[7] ALJ Order (Aug. 23, 2013) at 12-13.

On November 4, 2013, claimant filed an amended application for hearing alleging injury to his back, neck, abdomen and bilateral shoulders from December 13, 2012 and each and every working day through June 11, 2013, while lifting and moving furniture, as well as being pinned by a safe.[8]

The second preliminary hearing occurred on December 18, 2013. A St. Francis emergency room report dated December 13, 2012 was introduced into evidence. According to the report, claimant was seen by Kennen Thompson, M.D., for abdominal pain. Claimant provided a history of being "at work yesterday moving furniture. Was on the down steps when a 500 pound gun the [sic] case fell down against the [claimant], pending [sic] him against the wall and floor."[9] Claimant made no complaints of pain in his back, neck or shoulders. Review of systems was negative for back pain. Physical examination revealed no back tenderness. Dr. Thompson assessed an abdominal wall contusion.

Mr. Cochran, Mr. Cox and claimant all testified at the second preliminary hearing. Mr. Cox testified claimant initially complained of abdominal pain after the accident, but started making complaints of back pain the following day. He did not recall anything being mentioned about shoulder problems. While Mr. Cox did not know the date of the incident, he again testified both he and claimant reported the accident to Mr. Cochran the day it happened. It was his belief the date of the incident was most likely December 12, 2012, based on the emergency room record, but he could not say for sure. Mr. Cox testified he did not drop a gun safe before or after the one time that he did drop a safe.

Mr. Cochran testified he was not told of an incident in December 2012. Mr. Cochran testified claimant and Mr. Cox first told him in April 2013 that claimant had been injured from a gun safe falling on him. He indicated claimant never mentioned what part of the body was injured and simply stated, "I'm hurting."[10] After being notified of the incident in April 2013, he reviewed his records, but could not find any documentation showing that a gun safe had been moved that day. He did not search to see if a gun safe was moved on December 12, 2012.

Claimant acknowledged not telling Dr. Murati about a December 12, 2012 incident and acknowledged Dr. Murati's report omitted any mention of abdominal pain. He acknowledged telling Dr. Murati the wrong date for the gun safe incident. Claimant testified his low back progressively worsened and was aggravated with his continued work from the date of the gun safe incident through his last day worked.

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[8] Claimant again amended his application for hearing on November 20, 2013, changing the starting date to December 12, 2012.

[9] P.H. Trans. (Dec. 18, 2013), Cl. Ex. 1.

[10] *Id.* (Dec. 18, 2013) at 12-13.

After considering the evidence, Judge Sanders issued a February 11, 2014 Order stating:

> Claimant's evidence about giving the employer proper notice of his accident is simply not persuasive. Claimant has changed his testimony about when the accident occurred. Secondly, there is still no evidence Claimant gave proper notice, specifically as to particulars of the injury date and time and that Claimant has suffered a work-related injury.
>
> Therefore, based on the findings in prior preliminary hearing and the findings in this order, Claimant did not give proper notice under K.S.A. (2011 Supp.) 44-520(a).

Claimant filed a timely appeal.

PRINCIPLES OF LAW [11]

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states in part:

> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> . . .
>
> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 states in part:

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[11] The case has seemingly focused on a December 2012 accident. Theoretically, the 2013 amendments to the Kansas Workers Compensation Act could apply to the claim if it is proven claimant sustained injury by repetitive trauma with a date of injury on or after April 25, 2013.

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
>
> . . .
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; . . . .
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

The facts are muddled. The only issue on appeal concerns notice and the underlying decision does not contain a date of accident or date of injury by repetitive trauma. The medical evidence points to claimant injuring his abdomen when a safe fell down some stairs and pinned him to a wall on December 12, 2012. It is unknown whether the judge accepted or rejected claimant's allegation of injury by repetitive trauma.

This matter could be remanded to determine date of accident or injury by repetitive trauma. However, regardless of the date of accident or injury by repetitive trauma, Judge Sanders specifically indicated claimant failed to prove notice. The judge noted claimant changed his testimony as to when the gun safe incident occurred and his evidence regarding notice was not persuasive.

While the judge could have accepted the testimony of claimant and Mr. Cox that they informed Mr. Cochran about the gun safe incident and claimant's injury that very day, she was not bound by their testimony. The judge observed that both claimant and Mr. Cox could not sufficiently indicate what they told respondent about the incident, "but just that they told him about it."[12] Mr. Cochran denied hearing anything about a gun safe incident until April 2013 and he denied being told claimant was injured in December 2012 from a gun safe accident. The judge may have believed Mr. Cochran's testimony, as she heard live testimony from all three witnesses, having heard twice from claimant and Mr. Cochran. Quite simply, Judge Sanders did not accept claimant's evidence on the notice issue as credible. In this regard, claimant did not carry his burden of proof.

Additionally, it would appear difficult for claimant to give Mr. Cochran the particulars of the injuries he currently alleges when he denied back pain to the ER doctor and the ER doctor's physical examination revealed no back tenderness, in addition to the December 13, 2012 St. Francis record not mentioning any physical complaints mirroring those noted by Dr. Murati in mid-2013. Based on the current record, this Board Member will defer to the judge's multiple first-hand opportunity to assess witness credibility and conclude claimant failed to prove he provided proper and timely notice.

CONCLUSION

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes claimant failed to prove he provided proper and timely notice.

WHEREFORE, the undersigned Board Member affirms the February 11, 2014 preliminary hearing Order.[13]

IT IS SO ORDERED.

Dated this _____ day of May 2014.

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HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

[12] ALJ Order (Feb. 11, 2014) at 2.

[13] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

c: Mitchell W. Rice
mwr@mannlaw.kscoxmail.com
clb@mannlaw.kscoxmail.com

Cynthia J. Sheppeard
cjs@wrslaw.net

Darin M. Conklin
dconklin@aldersonlaw.com

Honorable Rebecca Sanders